No. 518

DEC 29 1952

IN THE

Supreme Court of the United States

October Term, 1952.

DEENA ARTWARE, INCORPCRATED, - Appellant,

versus

NATIONAL LABOR RELATIONS BOARD, - Appellee.

PETITION FOR WRIT OF CERTIORARI FROM THE SUPREME COURT TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT,

AND

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

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WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

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PETITION FOR WRIT OF CERTIORARI FROM THE SUPREME COURT TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

The petitioner, Deena Artware, Incorporated, prays that writ of certiorari, issue to review the judgment of the United States Court of Appeals for the Sixth Circuit. The opinion below is reported in 198 F. 2d 645.

STATEMENT.

In the building marked "existing Deena plant" on the plat, page 20, petitioner manufactured pottery lamp bases. On the plat marked "area of new construction" across a 50-foot railroad right of way from

the pottery plant, it began construction, through an independent contractor of a new plant, where the pottery lamp bases could be wired, finished and made ready for sale. Because a member of the Federal Department of Mediation and Conciliation failed to notify a Union official of his postponement for two (2) days of a meeting before him of the Union and Company bargaining committees, the Union went on strike. It picketed the existing plant and extended its picket lines so as to surround the new construction work and force the general contractor to stop work.

Petitioner sued the unions and recovered judgment for damages resulting from this secondary boycott. The judgment was affirmed. *United Brick & Clay Workers of America, et al.,* v. *Deena Artware, Inc.,* 198 F. 2d 637. Certiorari was denied December 8, 1952. The National Labor Relations Board, considering the idenitcal facts, held that there was no secondary boycott. Enforcement of the Board's ruling was ordered in spite of the obvious inconsistency in its findings of fact and prior judgment of the District Court. The Board also attributed the strike to unfair labor practices of petitioner, and ordered reinstatement of employees and payment of wages lost since May 26, 1948. Petitioner seeks a review of the judgment of the lower Court ordering enforcement of the Board's order.

JURISDICTION.

Jurisdiction is granted by *Title 29, Section 160(e), U. S. C. A., Section 10(e)*, of the Labor Management Relations Act, providing that the order of the United States Court of Appeals is subject to review upon writ of certiorari, as provided in *Sections 239, 240 of the Judicial Code as amended (Title 28, Sections 346 and 374 U. S. C. A.)*.

QUESTIONS PRESENTED.

I.

Is the judgment of the lower court establishing as the ultimate essential fact that picketing the area of new construction was a secondary boycott and awarding petitioner damages therefor res judicata in a proceeding before National Labor Relations Board in which the Union (defendant in the damage action) is the charging party and petitioner the respondent?

This question of Federal law has not been settled by this Court.

II.

Where the charge and complaint allege that unfair labor practices began on or about April 8th, and continued thereafter, should the charges be sustained on evidence of statements made by petitioner's President on several dates prior thereto?

Petitioner claims that this is analogous to a conviction upon a charge not made in conflict with applicable decisions of this Court.

III.

Should a work stoppage, resulting directly and immediately from the failure of a Conciliator to notify a Union official of the postponement of a bargaining meeting, the petitioner being entirely free from fault in the matter, be considered an unfair labor practice strike?

Petitioner contends that there can be no inadvertent or innocent unfair labor practice, and that the enormous penalty of rehiring and paying back wages to numerous employees for more than four and one-half (4½) years, should not be approved or enforced by a Court.

REASONS FOR ALLOWANCE OF WRIT.

I.

Controversies between labor and management frequently involve unfair labor practice charges and actions for damages, as authorized by the *Labor Management Relations Act. Title 29, Sec. 187, U. S. C. A.* Whether the action in the District Court involves the boycotts or jurisdictional disputes referred to in Section 187, or a violation of contract referred to in *Section 185 of Title 29,* different conclusions will frequently be reached by an impartial court on the one hand and the National Labor Relations Board, whose representatives have investigated charges, and caused complaint to be issued on the other hand. The affirming by the United States Court of Appeals of two decisions, upholding contrary and irreconcilable conclusions of fact is undesirable. This inconsistency can be avoided by applying the basic principles of *res judicata,* when such conflicting conclusions are considered

by the same Court. In this case, the judgment for damages was necessarily based upon the finding that there had been a secondary boycott. The United States Court of Appeals did not agree with the ruling of the Board as a matter of law. Nevertheless, they ordered enforcement of this ruling. 198 F. 2d 653. The privity between the defendant Union in one case, and the charging Union, acting through National Labor Relations Board, as its representative in the other is obvious.

II.

The unfair labor practice charge is not a pleading. It becomes the basis of the complaint, however, and the respondent must look to the complaint to find the case he must meet. The unfair labor practice charges are set out in Paragraph 6 (Record, page 41) and Paragraph 11 (Record, page 43) of the complaint. Both paragraphs began as follows:

> "Commencing on or about April 8, 1948, and at all times, thereafter, the respondent, by its officers and agents * * *."

The complaint was directed against the bargaining meetings and petitioner prepared to meet this issue. The charges were sustained on the basis of evidence of remarks made by petitioner's President prior to the above date, having nothing to do with the bargaining meetings, and an interview given to a Paducah newspaper by the President, after all of the events referred to in evidence had transpired. Petitioner

should be permitted to rely upon the statement made against him. He should not be required to meet charges not made. In the attached brief, we will point out the language of the opinion in the lower court, showing that the findings against petitioner were not based on the conduct of the bargaining, the offense really charged.

III.

In the attached brief, we will point out in the opinion of the lower court a finding that there was no justification on the part of the employees in imputing to the petitioner any fault in failing to notify a union official of the postponement of the meeting set for May 26th. Neither the Board nor the Court found that petitioner was at fault in this matter. The finding that "fault on the part of the respondent is not a necessary element" is erroneous. An unfair labor practice is a wrongful act. Otherwise the heavy penalty, by whatever name called, should not be imposed.

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NATIONAL LABOR RELATIONS BOARD, - *Appellee.*

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

STATEMENT.

In December, 1947, petitioner entered into a contract with Vandevelde and Augustus, of Paducah, Kentucky, for the construction of a plant on the ground marked "area of new construction" on the plat. In March, 1948, at a consent election conducted at petitioner's existing plant by National Labor Relations Board, petitioner's employees selected United Brick & Clay Workers Union as their bargaining representative. Petitioner thereupon designated its Manager, Corbin Meriwether, its Director of Personnel, Mrs. Kathryn Hendron, and an office employee, Mrs. Lenola Henson, as its bargaining committee. The Union Com-

mittee of ten, with its International representative, Earl Bellew, and the Employer's Committee, held eight meetings, some of them lasting as long as four (4) hours. Agreements were reached and reduced to writing on some points. There was no final agreement, however, on a completed contract. In May, 1948, the union committee stated in substance that they wished to call upon a representative of the Department of Mediation and Conciliation to assist them. No objection being made to this, a meeting was scheduled to be held with the Conciliator, Garth K. Ferguson, at the offices of petitioner's attorneys, on May 26, 1948. Later, the Conciliator desired to postpone the meeting to May 28th. He notified the management committee, and stated that he would notify the Union Committee, including Bellew, the International representative, whose home was at Olive Hill, Kentucky. Bellew failed to get the notice until it was too late to prevent his making a trip to Paducah two (2) days earlier than necessary. When he learned at the attorneys' office that the meeting had been postponed, he discussed the matter with members of his committee, and determined to call a strike. At 1:45 o'clock that day three members of the committee notified the Manager of the plant that they would walk out fifteen (15) minutes later, at two (2) o'clock. The Manager protested, explaining that petitioner was in no way at fault, and should not be held responsible for a mistake of the Conciliator. Nevertheless, approximately fifty-seven (57) employees, more than one-half (½) of those employed at the plant, quit work at two (2) o'clock on

that day. Their checks were delivered to them within the next hour and when, two (2) days later, they offered to return to work if the employer would bargain about the charge of nine (9) employees who had been discharged in April, they were told that they were no longer in the employ of the Company. During the bargaining negotiations, nine (9) members of the Union Committee had been discharged for flagrant disobedience of orders. This action was not disapproved by National Labor Relations Board, though it was the subject of a charge. The bargaining sessions continued after the discharge of the nine (9) employees. Petitioner contends that the employees who quit work at 2 P. M., May 26, 1948, were ordered to walk out solely because Earl Bellew failed to receive notice of the postponement of the meeting.

Shortly after the events of May 26, 1948, United Brick & Clay Workers Union, under the direction of its own committees, Earl Bellew, its International representative, and Edmund Grimes, an A. F. of L. Organizer, began picketing. The construction work on the new plant east of the existing pottery plant, had progressed to the point where the foundation had been laid, and the contractors had prepared to begin the erection of the structural steel. The general contractors in charge of the work were Vandevelde & Augustus. The subcontractor, in charge of the erection of steel, was R. C. Jennings, whose superintendent was H. A. Downs. None of these parties Vandevelde & Augustus, R. C. Jennings, or H. A. Downs, had any dispute with their employees (R. 729, 797). When,

about June 1, 1948, carloads of structural steel, to be used in the construction of the building, were placed on the side track, which had already been constructed at the building site the union caused the picket line to be extended so as to include within it the construction work. In order to stop work on the new addition, the pickets walked east on Ohio Street to Second, along Second to Jackson Street to the right of way of the N. C. & St. L. Railway, and back along that right of way to Ohio Street. This picketing of the construction work was largely done by the United Brick & Clay Workers, under the leadership of Earl Bellew, and A. F. of L. Organizer, Edmund Grimes. Injunction orders were obtained against violence in the Circuit Court of McCracken County, Kentucky. Finally an order was obtained against the picketing of the new construction work. Shortly after this order was issued against the United Brick and Clay Workers Union, the Teamsters' Union began picketing the construction site, and kept it up until the work was finally abandoned. Signs carried by picketers bore the words "respect the picket line" (R. 796). The picketing was not continuous, but was resumed whenever Downs, Superintendent of R. C. Jennings, attempted to do any construction work (R. 734, 795, 797, 799, 802, 803). At no time did the general contractor, or his subcontractors, have any labor dispute with their employees. The construction work had to be suspended, and finally discontinued because the employees of the contractor and subcontractor refused to cross the picket lines established by the union, or extended by them so as to include the construction work.

ARGUMENT.

I.

Judgment of District Court, awarding damages for secondary boycott against the union is res judicata in unfair labor practice proceeding in which the union is charging party, and the respondent is the plaintiff in the action for damages.

It is impossible to reconcile the conclusions of the District Court affirmed in *United Brick & Clay Workers, etc.,* v. *Deena Artware, Inc.,* 198 F. 2d 637, and the order of the Board approved in the enforcement proceeding of *N. L. R. B.* v. *Deena Artware, Inc.,* 198 F. 2d 645. The lower court discussed the conflict on pages 642 and 643 of the opinion in the action for damages, and on page 653 of the enforcement proceeding. In discussing the picketing in the action for damages, the Court said:

> "The physical facts, as above described, show clearly that it was not necessary to extend the picket line around the area of construction in order to cover all the entrances to the existing plant and warehouse. The evidence also showed that the picketing of the area of construction was not continuous, but was in effect only when attempts were made to unload steel or to perform work on the area.
>
> * * * * * * *
>
> "We recognize that this finding is contrary to the finding in the companion case of N. L. R. B. v. Deena Artware, Inc., No. 11156, *supra,* in which the Trial Examiner found that the picketing of

the area of construction which caused the cessation of work by the general contractors was on the part of the Teamster's Union and not by the Appellants, which finding we have upheld and on which we have based a ruling in that case. Under our existing system of courts, juries, administrative agencies, and appellate review, such findings, even though inconsistent, are not invalid, and one does not destroy the other. The two proceedings, even though arising out of the same labor dispute, were heard by separate fact finding agencies. The witnesses in the two proceedings were not the same. The cross-examination of some witnesses who testified in both proceedings was not by the same attorneys. Necessarily, the evidence produced in the different proceedings by such testimony was not identical. Each fact finding agency was entitled to make its own decision upon the evidence before it. Though this Court on review recognizes the inconsistency, and may not be in accord with one of the two rulings if it was making the ruling as a matter of original jurisdiction, it does not have the right to set aside such ruling, if, in case of the jury verdict, it is supported by substantial evidence, or, in the case of the Labor Board proceeding, it is supported by substantial evidence on the record considered as a whole. In our opinion, the respective findings are so supported in each of the two proceedings."—198 F. 2d., pp. 642, 643.

The following is quoted from the opinion in the enforcement case:

"The 'secondary boycott' failure of the labor dispute herein involved is the chief issue in the case of United Brick & Clay Workers of America,

> etc., v. Deena Artware, Inc., 6 Cir., 198 F. 2d 637, a companion case to this case, arising out of the same labor dispute, and in which an opinion is being handed down at this time. A more extended discussion of the issue is made in the opinion in that case, and need not be repeated here. *As shown by that opinion, we do not agree with the ruling of the Board as a matter of law,* and are of the opinion that whether the Union was guilty of a 'secondary boycott' contrary to the provisions of Sec. 8(b) (4) (A) of the Labor Management Relations Act was a factual question for determination under the particular facts of the case. The Examiner found in favor of the Union. The finding is supported by substantial evidence on the record considered as a whole, and is accepted on this review. Accordingly, it becomes unnecessary to consider the legal sufficiency of Respondent's defense on this phase of the case."—198 F. 2d 653.

We respectfully urge that the irreconcilable conflict between the conclusions expressed in the opinions in the companion cases should be avoided, if possible, and in the interest of justice we insist that it is possible to avoid it. The same witnesses testified in both proceedings about the facts as to the picketing of the construction work. Attorneys for National Labor Relations Board did not participate in the trial of the action for damages. Attorneys for the Union participated actively in both proceedings. We stated in our petition that the question of Federal law discussed in this part of our argument had not been settled by this Court. A similar question was considered by the *New York Court of Appeals in New York State Labor Relations Board*

v. *Holland Laundry, Inc., et al.,* 294 N. Y. 480; 161 A. L. R. 802; 63 N. E. 2d 68. In that case, a judgment was entered in favor of an employer to enjoin a strike as violative of a collective bargaining agreement. The New York Court held that the judgment was not *res judicata* against the State Labor Board, in a proceeding in which the Board found that the bargaining agency of the employees was a company dominated union. The Court, speaking through Judge Lehman, held that the final judgment of the Court was conclusive and binding upon the parties in all subsequent litigation between them. While the distinction made between the Board and the employees is against our contention here, it can be distinguished, and of course the ruling is not a precedent binding on this Court. We are not familiar with the procedure before the New York Board. A labor board is, of course, a public agency. In such a proceeding as that against Deena Artware, however, it is acting upon charges presented by a union, and the Board acting for the union, should be bound by the judgment rendered against the union by the District Court.

In the case of *Evergreens* v. *Joseph D. Nunan, Commissioner of Internal Revenue,* 141 F. 2d 927; 152 A. L. R. 1187, the United States Court of Appeals of the Second Circuit made a distinction between an ultimate fact, and an evidentiary fact (referred to by the Court as mediate datum) as respects the effect of a judgment as estoppel. Applying the distinction here, it appears to us that the existence of a secondary boycott was an ultimate fact found by the District Court

in awarding judgment for damages. The conclusion was certainly essential to that judgment, and since it was necessary to the result in the action for damages, it should be binding on the union and on the Board acting for the union in the enforcement proceeding. Recognizing the distinction in *Commissioner of Internal Revenue* v. *Sunnen,* 333 U. S. 591, 68 S. Ct. 715, this Court said:

> "Of course, where a question of fact essential to the judgment is actually litigated and determined in the first tax proceeding, the parties are bound by that determination in a subsequent proceeding, *even though the cause of action is different.*"

In the case at bar, the difference between the parties is nominal, not actual, the Board being the representative of the charging party. The cause of action is different. Neverthless we submit that the finding that the picketing was secondary, which was essential to the judgment in the damage suit, should be binding in the enforcement proceeding. All of the reasons sustaining the doctrine of *res judicata* would seem to be applicable here. In addition to these reasons, we may add the avoidance of such conflicting conclusions as are presented in these companion cases.

II.

A finding that petitioner was guilty of unfair labor practices on evidence not germane to the charges or the complaint was erroneous.

In the petition we have pointed out that the unfair labor practices charged are alleged to have commenced on or about April 8, 1948. The meetings of the bargaining committees began on April 8th, and petitioner was charged with failure to bargain in good faith. In the paragraphs of the complaint referred to (A. pp. 41, 43), the Board set out the case against the petitioner. Petitioner was not required to anticipate that an effort would be made to rest the case on statements made by George H. Weiner, President of the petitioner, at times not referred to in the charges, or the complaint. We had a right to regard this evidence as incompetent and we did not have Weiner present to testify about it. The findings of the Board are outlined by the Court in the first numbered paragraph of the opinion. It will be noted that they rest upon statements made and things done by the President of petitioner before April 8th, and on or about July 22d, when he gave an interview to a local paper. On July 22d, the boycott had caused a suspension of the construction work on petitioner's new plant, and the events considered in the evidence had ended. We quote from the opinion:

> "The threats of Respondent's President to withdraw the employees' privileges and freedoms, his references to stabs in the back, the revocation of various privileges after the election, his warn-

ing that it would not be his fault if the employees were out of work or starving, and the statement in the newspaper about discontinuing expansion of the plant at Paducah and possible abandonment of the plant entirely if hazards and difficulties were thrown in his way, fully sustain the Board's conclusion."

A reading of the opinion and the order of the Board supports our argument that the findings of the Board and the lower Court were based on statements and acts not referred to in the charges or the complaint. We have pointed out that hundreds of pages of testimony was heard, as to what transpired at the bargaining meetings. According to the complaint, this was the important matter. There appears to be no finding by the Court adverse to the petitioner as to the conduct of the bargaining.

> "Conviction upon a charge not made would be sheer denial of due process. DeJonge v. Oregon, 299 U. S. 353, 363, 57 S. Ct. 255, 259, 81 L. Ed. 278; Stromberg v. California, 283 U. S. 359, 367, 368, 51 S. Ct. 632, 535, 75 L. Ed. 1117, 73 A. L. R. 1484." —*Thornhill* v. *State of Alabama,* 310 U. S. 88, 60 S. Ct. 736.

III.

There can be no innocent unfair labor Practice.

We have pointed out in our statement the circumstances under which the so-called strike began. Neither the Board nor the Court has found that the respondent was in any way at fault in the matter of postponing the

meeting set for May 26th. If there had been any oversight or omission on the part of the respondent in this connection, most certainly it would have been brought out. After the case was remanded, we showed the facts relative to the action taken by the Union at its meetings and showed further that there was no compliance with the provisions of the Constitution of the Union (Opinion of the Court, page 9). If this had been a strike provoked by the unfair labor practice of the respondent extending back to March 16th, or even extending back to April 8th, there would have been abundant time for the Union to take the necessary steps to comply with the requirements of its own constitution and to have the strike approved and duly authorized. Its failure to take any of these steps not only shows that the strike was unauthorized, it also shows that it was called on the spur of the moment, as the result of the childish anger of a union official. All of the circumstances surrounding this work stoppage of May 26th showed that it was not a planned protest against continuing unfair labor practices, but was a sudden flare-up, resulting from the anger of Bellew. This is shown not only by the failure to comply with the union's constitution, but by the quick realization on the part of the union that the strike should not have been called and should be speedily terminated, if possible. Within less than three (3) days, the union members who had gone out on strike wanted their jobs back. There had been no change in the attitude of the management of this respondent as to the alleged unfair labor practices. If the strike had been a protest against unfair labor prac-

tices, why did the strikers suddenly determine to abandon the protest? The truth is that the strikers realized by Saturday, May 29th, that they had abandoned their jobs without cause or justification; that they were in an untenable position and, if possible, should abondon the so-called strike. All of this shows the real cause of the strike, which was the failure of Garth Ferguson to give notice to Bellew of the postponement of a meeting. The unfair labor practice evidence is built up as an afterthought, to justify hasty and ill-considered action.

In connection with the conduct of the petitioner on May 26th, when a large number of its employees quit work, the Court said:

> "Fault on the part of the respondent is not a necessary element."

An unfair labor practice is a wrongful act; there cannot be an innocent unfair labor practice. The penalties for such guilt are costly and severe. They should not be imposed on a party not in fault.

Respectfully submitted,

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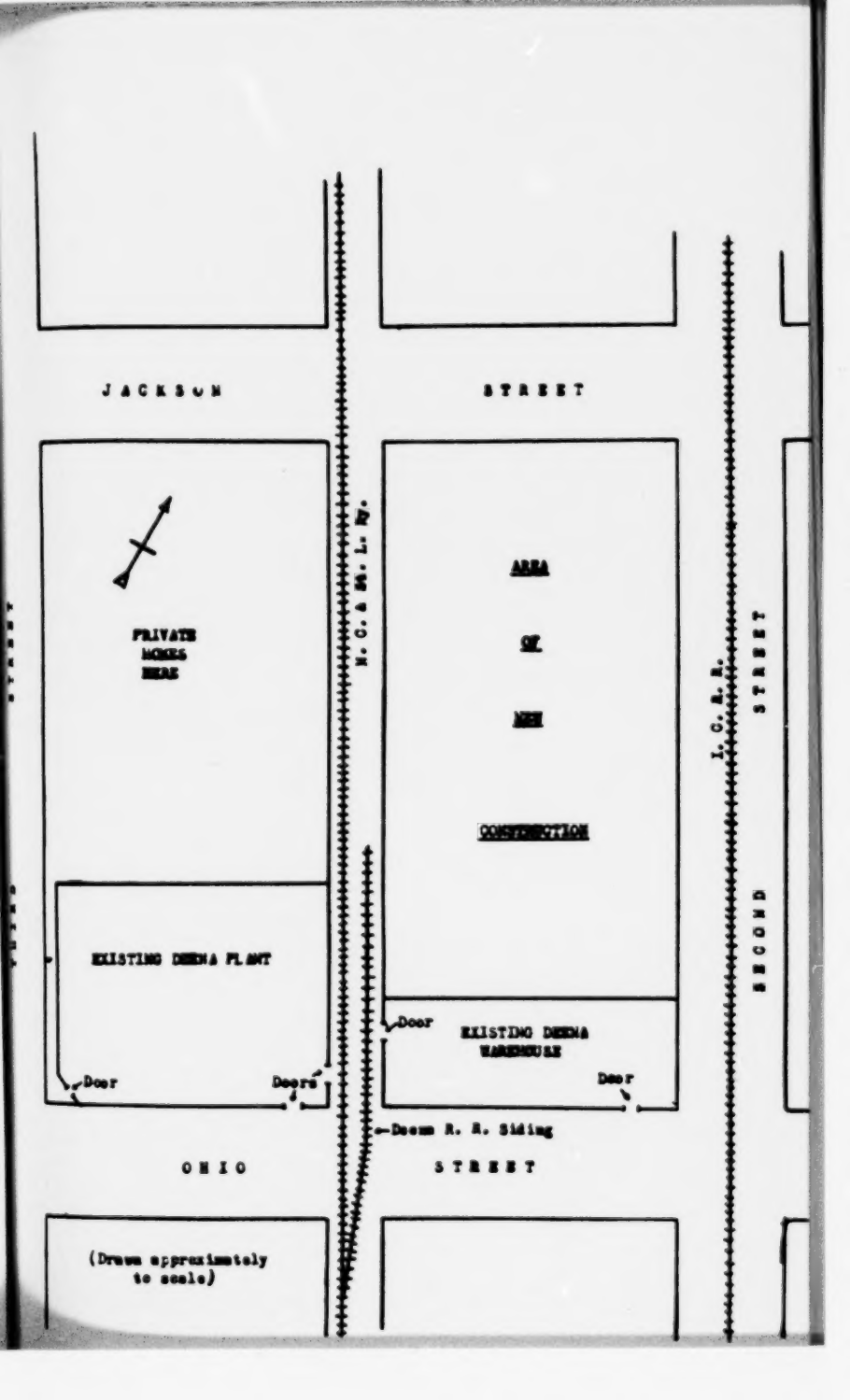
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SECOND
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